

David L. Meier  
Director  
Legislative & Regulatory Planning



**Cincinnati Bell  
Telephone**

201 E. Fourth Street  
P. O. Box 2301  
Cincinnati, Ohio 45201-2301  
Phone: (513) 397-1393  
Fax: (513) 241-9115

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July 15, 1996

JUL 15 1996

Federal Communications Commission  
Office of Secretary

Mr. William F. Caton, Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington D.C. 20554

Re: Notice of Inquiry and Notice of Proposed Rulemaking, GC Docket No. 96-55

Dear Mr. Caton:

Enclosed are an original and 10 copies of the Reply Comments of Cincinnati Bell Telephone Company in the above referenced proceeding. A duplicate original of these Reply Comments is also provided. Please date stamp this as acknowledgment of its receipt. Questions regarding these Reply Comments may be directed to Mr. Robert J. Wentz at the above address or by telephone on (513) 397-1248.

Sincerely,

*[Handwritten signature]*

cc: ITS

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JUL 15 1996

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of )  
 )  
Examination of Current Policy ) GC Docket No. 96-55  
Concerning the Treatment of )  
Confidential Information )  
Submitted to the Commission )

**REPLY COMMENTS OF CINCINNATI BELL TELEPHONE COMPANY**

**I. INTRODUCTION**

Many of the Comments received in response to the instant NPRM appear to either debate the basic principles of the FOIA Exemption 4 or to attempt to re-litigate through this Rule-Making Proceeding issues which were adversely resolved in a prior private docket.

In order to address these comments productively, it is first appropriate to focus on the purpose of this proceeding. The primary objectives of a Commission policy regarding treatment of information submitted to the Commission should be:

- to maximize the flow of information that is not confidential;
- while preventing disclosure of information submitted confidentially, if making the information available would put the submitting company at a competitive disadvantage;
- at the least burden to the Commission.

The comments received in response to the Commission's NPRM should be evaluated against these objectives. While Cincinnati Bell Telephone Company ("CBT"), an independent, mid-size local exchange carrier ("LEC"), believes that its own comments balanced these goals effectively, some of the comments submitted by other parties also offered insightful suggestions regarding how to balance these sometimes inconsistent objectives. In the

analysis below, CBT incorporates the provisions of those comments which CBT believes are improvements over CBT's original suggestions, while addressing the deficiencies in other comments which CBT believes should be rejected.

## **II. ANALYSIS OF GENERAL ISSUES**

### **A. Whether the Commission Should Adopt A New Standard Regarding Confidentiality.**

Based on the volume of response to the NPRM, it is clear that the Commission should issue standard rules which will be used to address requests for confidentiality in all proceedings before the Commission. It appears from the comments so far received that LECs, which routinely are required to submit competitively-sensitive cost data to the Commission in connection with tariff filings, believe that competitors will seek access to that information in order to gain a competitive advantage. The comments filed by would-be competitors manifest that the LECs' concerns are valid. Instead, the competitors' comments to the Commission clearly state that in fact they do seek LECs' cost information filed with the Commission in order to determine their own pricing strategies and to determine whether they can profit from entering a particular market.<sup>1</sup> Accordingly, it is clear that a standard is necessary in order to provide a framework which will govern requests for confidentiality and disputes which arise from those requests.

### **B. Proposed Process For Addressing Confidentiality Requests**

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<sup>1</sup>See, e.g., Comments of Time Warner Communications Holdings, Inc., at page 4.

The comments to the Commission for addressing confidentiality varied with the bias of the party offering the suggestion. Parties who usually find themselves in the position of submitting information indicated that information submitted as confidential should always be treated as confidential without further proceedings. Potential competitors responded with concerns that the Commission will be inundated with specious requests for confidentiality which will strain the Commission's limited resources. Like foxes offering to guard the henhouse because the watch dogs are overworked, the would-be competitors suggest that confidentiality requests should generally be rejected in order that the competition can fully assist the Commission in performing its duties.

CBT believes that its own comments offer a reasonable compromise between these positions which will fully effectuate the goals set forth above. First, concerns regarding over-broad or frivolous designation of confidentiality can be addressed with the affidavit procedure suggested in Section II(D) of CBT's initial comments.<sup>2</sup> Under this procedure, an

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<sup>2</sup>CBT proposed requiring an affidavit which would state:

1. A statement that the submitter has reviewed the submission and determined that it contains confidential information;
2. A statement that the submitter is enclosing with the request for confidentiality two versions of the submission -- one marked "Confidential" which contains the confidential information and one marked "Public Version" which contains all information from the Confidential Version except that which has been specifically determined to be confidential;
3. A statement that the information concerns a service which is either subject to competition at the time of submission or which is expected to be subject to competition within one year of the time of submission;
4. An explanation of why disclosure of the information would result in substantial harm to the business' competitive position;

officer of the submitter must state under oath that the filing at issue contains information that is truly confidential, and therefore protected from disclosure under the FOIA Exemption 4 standard. CBT's proposed procedure further requires the submitter to submit a redacted version of the filing which does not reveal confidential information which can be made public. CBT recognizes that this procedure is less convenient to the submitter than merely filing an entire document under seal. However, as a party that regularly submits information to the Commission, CBT is willing to undertake this burden in order to minimize disputes regarding confidential material. CBT notes that this procedure is already in place

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5. A description of the measures which the business has taken to prevent undesired disclosure of the confidential information to persons outside the business;
  6. A description of the extent to which the confidential information has in fact been disclosed to persons outside the business;
  7. A statement regarding whether the information falls within a category set forth in 47 CFR 0.457(d).

in some states,<sup>3</sup> and provides a workable framework for avoiding competitive harm while maximizing the free-flow of non-sensitive information.

Once confidential information is submitted with the above affidavit, CBT believes that no publication of the confidentially submitted data is ordinarily appropriate. As the Court of Appeals noted in *National Parks*,<sup>4</sup>

. . . not only as a matter of fairness, but as a matter of right, and as a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors.

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<sup>3</sup>See, e.g., 807 Ky. Ad. R. 5:001, which provides

#### Section 7. Confidential Material.

\* \* \*

(a) Any person requesting confidential treatment of any material shall file a petition which:

1. Sets forth specific grounds pursuant to KRS 61.870 *et seq.*, the Kentucky Open Records Act, upon which the commission should classify that material as confidential; and

2. Attaches one (1) copy of the material which identifies by underscoring, highlighting with transparent ink, or other reasonable means only those portions which unless deleted would disclose confidential material. Text pages or portions thereof which do not contain confidential information shall not be included in this identification.

(b) The petition, one (1) copy of the material which is identified by underscoring or highlighting, and ten (10) copies of the material with those portions obscured for which confidentiality is sought, shall be filed with the commission.

Many states simply exempt this type of information from public disclosure. See, e.g., Colo. R.S. 40-15-203 (3)-(4) (stating that all information submitted to the state commission in an application to refrain from regulation for competitive purposes shall remain confidential); Fla. Stat. § 366.093 (exempting confidential utility cost information from public disclosure); 51 Okl. St. § 24A.22 (exempting confidential utility cost information from public disclosure).

<sup>4</sup>*National Parks & Conservation Assn. v. Morton*, 498 F.2d 765, 769 (D.C. 1974).

In rare instances where a party raises a credible claim that testing of confidential information beyond that which the Commission may feasibly undertake is necessary to ensure that such information is free of errors and inaccuracies,<sup>5</sup> the use of an independent auditor permits this testing without disclosing the confidential information to the submitter's competitors.<sup>6</sup>

C. Model Protective Order.

CBT agrees with the comments of the Joint Parties regarding the model protective order with certain exceptions. First, CBT reiterates its previously expressed view that protective orders are ordinarily not appropriate. Instead, CBT believes that information which is sworn by affidavit to be non-public and competitively sensitive should simply be withheld from disclosure by the Commission unless limited disclosure is agreed to by the parties.

Additionally, in those circumstances where a protective order is agreed to by the parties, CBT believes that in addition to the modifications to the proposed model order which were suggested by the Joint Parties, it is crucial that the Commission permit the submitter of information to know in advance the specific persons to whom information will be disclosed in order that they have an opportunity to advance any specific objections to that individual prior to disclosure. CBT proposes adding the following paragraph to the proposed order for this purpose:

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<sup>5</sup>See, e.g., Comments of General Communications, at page 5.

<sup>6</sup> See In Re Commission Requirements for Cost Support Material to Be Filed With Open Network Architecture Access Tariffs, 7 FCC Rcd. 1526 (1992), in which the Commission ordered submission of confidential information to an independent auditor, rather than to the submitter's competitors, and devised a procedure whereby the competitors submitted questions to the auditor regarding the submitter's cost practices.

Five working days before confidential information is disclosed to any Authorized Representative, the name and curriculum vitae of such representative shall be provided to the submitting party. If the submitting party has specific objections to the qualifications of the Authorized Representative to review the confidential information, such objections shall be made in writing within three days of notification and served on the Commission and the party proposing to provide information to the Authorized Representative. The objections shall be ruled on before any confidential information is disclosed.

**D. Timing of Ruling on Confidentiality Claims.**

CBT agrees with the comments of Sprint and the Joint Parties that deferring tariff applications in order to rule on requests for confidentiality is inappropriate and inconsistent with the Telecommunications Act of 1996.<sup>7</sup> As these parties correctly point out, the materials submitted with a tariff filing are created specific to that filing, and delay may render the data stale or otherwise inaccurate. Moreover, the Telecommunications Act of 1996 was intended to streamline and accelerate tariff filings in the new competitive environment, and delay would be inconsistent with this objective. Any legitimate concerns which may arise as a result of abuse of confidentiality designations can be addressed by the Commission on a party-specific basis.

**III. CONCLUSION**

CBT respectfully requests the Commission to consider these comments as it develops a policy against which to evaluate requests for confidential treatment of information provided to it in the course of tariff applications and other proceedings.


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<sup>7</sup>See Comments of Sprint Corporation at ¶ IV page 4; Comments of Joint Parties at §III.C.2(b), pages 11-13.



Respectfully submitted.

FROST & JACOBS

By   
Thomas E. Taylor  
Nancy Rue

2500 PNC Center  
201 East Fifth Street  
Cincinnati, Ohio 45202  
(513) 651-6800

Dated: July 15, 1996

Attorneys for Cincinnati Bell  
Telephone Company

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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that copies of the foregoing **Reply Comments of Cincinnati Bell Telephone Company** have been delivered by first class United States Mail, postage prepaid, on July 15, 1996, to the persons on the attached service list.

  
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Amy K. Collins

WILLIAM F CATON ACTING SECRETARY  
FEDERAL COMMUNICATIONS COMMISSION  
1919 M STREET NW ROOM 222  
WASHINGTON DC 20554

INTERNATIONAL TRANSCRIPTION SERVICES  
2100 M STREET NW SUITE 140  
WASHINGTON DC 20037

CURTIS KNAUSS  
AITKEN IRVIN LEWIN BERLIN VROOMAN &  
COHN  
1709 N STREET NW  
WASHINGTON DC 20036

GARY PHILLIPS  
AMERITECH  
1401 H STREET NW  
SUITE 1020  
WASHINGTON DC 20005

LAWRENCE KATZ  
BELL ATLANTIC TELEPHONE COMPANIES  
1320 NORTH COURT HOUSE ROAD  
8TH FLOOR  
ARLINGTON VA 22201

LOUISE L M TUCKER  
BELL COMMUNICATIONS RESEARCH INC  
2101 L STREET NW  
SUITE 600  
WASHINGTON DC 20037

M ROBERT SUTHERLAND  
BELLSOUTH CORPORATION  
1155 PEACHTREE STREET NE  
SUITE 1700  
ATLANTA GA 30309-3610

DAVID J GUDINO  
GTE SERVICE CORPORATION  
1850 M STREET NW  
SUITE 1200  
WASHINGTON DC 20036

JOE D EDGE  
TINA M PIDGEON  
GENERAL COMMUNICATION INC  
901 FIFTEENTH STREET NW  
SUITE 900  
WASHINGTON DC 20005

ROBERT J KAY  
LAW OFFICE OF ROBERT J KELLER  
2000 L STREET NW  
SUITE 200  
WASHINGTON DC 20036

ALAN M LURYA  
LAW OFFICE OF ALAN M LURYA  
500 N STATE COLLEGE BLVD #1200  
ORANGE CA 92668

DONALD ROWE  
NYNEX CORPORATION  
1111 WESTCHESTER AVENUE  
ROOM 1224I  
WHITE PLAINS NY 10604

DANIEL L BRENNER  
LORETTA P POLK  
NATIONAL CABLE TELEVISION ASSOC INC  
1724 MASSACHUSETTS AVENUE NW  
WASHINGTON DC 20036

LUCILLE M MATES  
NEVADA BELL  
PACIFIC BELL  
140 NEW MONTGOMERY STREET  
ROOM 1526  
SAN FRANCISCO CA 94105

MARGARET E GARBER  
NEVADA BELL  
PACIFIC BELL  
1275 PENNSYLVANIA AVENUE NW  
WASHINGTON DC 20004

DURWARD D DUPRE  
MARY W MARKS  
J PAUL WALTERS JR  
SOUTHWESTERN BELL TELEPHONE CO  
ONE BELL CENTER ROOM 3520  
ST LOUIS MO 63101

BARRY A FRIEDMAN  
SCOTT A FENSK  
THOMPSON HINE & FLORY  
1920 N STREET NW  
SUITE 800  
WASHINGTON DC 20036

ROBERT B MCKENNA  
US WEST INC  
1020 19TH ST NW  
SUITE 700  
WASHINGTON DC 20036

JAMES D ELLIS  
ROBERT M LYNCH  
DAVID F BROWN  
SBC COMMUNICATIONS INC  
175 E HOUSTON RM 1254  
SAN ANTONIO TX 78205

JAY C KEITHLEY  
LEON M KESTENBAUM  
SPRINT CORPORATION  
1850 M ST NW SUITE 1110  
WASHINGTON DC 20036

BRIAN CONBOY  
TIME WARNER COMMUNICATIONS  
HOLDINGS INC  
THREE LAFAYETTE CENTRE  
1155 21ST STREET NW  
WASHINGTON DC 20036